

U.S. Department of Labor

Office of Administrative Law Judges
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Washington, DC 20001-8002



DATE ISSUED: October 5, 2000

Case No.: 2000-WIA-2

IN THE MATTER OF:

MaCHIS LOWER CREEK INDIAN TRIBE
OF ALABAMA (MLCITA)
Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

Appearances:

Malcolm R. Newman, Esq.
For the Claimant

Louisa M. Reynolds, Esq.
For the Respondent

Before: Linda S. Chapman
Administrative Law Judge

DECISION AND ORDER

This case arises under the provisions of the Workforce Investment Act, 29 U.S.C. § 2801 et seq. (WIA or Act) and the regulations contained at 20 C.F.R. § 660 et. seq. The WIA provides funding for job training and employment programs for Indian and Native American Tribes, under the administration of the Bureau of Indian Affairs. Grants aimed at Native Americans are overseen by the federal government, and parties interested in receiving such grants apply directly to the Department of Labor, pursuant to Solicitations for Grant Applications published in the Federal Register. Grants are made to specified geographic areas, and the recipient oversees the program in those areas. Parties

which unsuccessfully apply for grants may request review of the grant officer's decisions by the Office of Administrative Law Judges. 20 C.F.R. §§ 667.800, 667.325.

In this case, the MaChis Lower Creek Indian Tribe of Alabama (MLCITA) applied to be the grant operator for the state of Alabama for the 2000-2002 program years, but was rejected in favor of the incumbent operator, the Inter-Tribal Council of Alabama (Council). MLCITA appealed this matter to the Office of Administrative Law Judges. I held a formal hearing in Montgomery, Alabama on August 15, 2000.

My decision is based on the evidence admitted at the hearing, which reflects the evidence the grant officer had at the time she made her decision in this case.¹ Evidence and testimony offered at the hearing which was not available to the grant officer is not considered.²

ISSUE

Whether the decision of the grant officer was reasonable, and not arbitrary or capricious, an abuse of discretion, or not in accordance with the law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workforce Investment Act provides funds to organizations to provide employment and job training services to Indians and Native Americans. Because Indian and Native Americans are deemed best served by an Indian or Native American organization to coordinate resources within their communities, the WIA establishes a priority for awarding grants to such organizations.

Grants under the Workforce Investment Act are awarded every two years. When the appropriate time comes to solicit grantees, the Department of Labor publishes a Solicitation for Grant Applications in the Federal Register, which provides the deadlines and criteria by which interested organizations can apply for the grants. To do so, interested organizations submit a Notice of Intent to the grant officer, following the guidelines in the solicitation. If more than one organization applies to provide services in the same geographic area, the competing organizations are so notified, and are

¹ Specifically, I admitted Department of Labor Exhibits A-H (DX); Plaintiff's Exhibits A-F, H, and I (PX); and ALJ Exhibits 1-3 (ALJX).

² In response to the Prehearing Order issued by Judge Thomas Burke on April 5, 2000, Ms. Nancy Carnley, on behalf of the Tribe, submitted a large volume of letters, memoranda, news clippings, and various other documents that appear to have little to do with the grant proceeding, but which reflect long-standing rivalry and tensions and competition between the Council and the Tribe, as well as individual members of each group. After I conducted a telephone conference with Mr. Malcolm Newman, counsel for the Tribe, and Ms. Reynolds, counsel for the Department, and explained the limited scope of my review, Mr. Newman submitted a much smaller group of exhibits, which I admitted, save for PX G.

allowed to submit revised Notices of Intent. The competing applications are reviewed by a panel of technical experts, who individually review each application against the criteria listed in the Solicitation, compile strengths and weaknesses, and assign scores. These scores are then tabulated and averaged, and the results provided to the grant officer (Tr. 59-62). The grant officer reviews the panel's recommendation, as well as the applications. Additionally, she may request a pre-award clearance on the applicants, to ensure that there are no problems with fraud, debt collection problems, or disallowed costs on audit, on the part of any applicants (Tr. 62). The grant officer is not bound to follow the recommendation of the panel.

The party or parties not chosen for the grant can request that the grant officer reconsider the decision. The party losing the reconsideration request can then appeal the grant officer's determination to the Office of Administrative Law Judges.

In this case, the Solicitation for Grant Applications was published in the Federal Register on September 13, 1999 (Tr. 57; PX-H). It invited interested parties to submit a Notice of Intent for grants for the 2000 and 2001 program years, and included instructions for doing so. The Solicitation also set out five criteria that would be considered in selecting the grantee, as well as the points that would be assigned to each factor. The Tribe and the Council, the incumbent, were the only entities that submitted applications in their geographic area (PX-G). Both applicants were notified that they were in competition with each other, and were allowed time to submit a "full" Notice of Intent, modifying or expanding on their initial application, or providing letters of support as to why they would be the better provider of employment and training services for the local Native American population (DX-F). Both parties submitted a Final Notice of Intent (DX-E).

As there was more than one application within the same geographic area, the grant officer, Ms. Lorraine Saunders, referred the applications to a technical review panel, composed of three persons with experience or technical knowledge in the area of Indian and Native American programs (Tr. 60-61). The panel members reviewed the applications to determine how well they met the criteria in the Notice of Intent, and assigned scores to the applicants for each criteria. The panel then met and compiled a summary of the strengths and weakness of each application, and tabulated and averaged the numerical scores. The panel scored the Council's application at 60 out of 100, and the Tribe's at 18 out of 100. This information was then provided to Ms. Saunders (Tr. 62, PX-D).

Ms. Saunders reviewed the panel's recommendation, as well as the two applications. She did not receive any adverse information on either applicant from the pre-award clearance procedure. Ms. Saunders concurred with the panel's assessment of the strengths and weaknesses of the two applicants. Noting the more than forty point discrepancy, Ms. Saunders selected the Council as the grantee (Tr. 63-64).

The Tribe was notified that it was not selected as the grantee, as well of its right to request a debriefing identifying the Tribe's proposal's strengths and weaknesses, and to appeal the determination to the Office of Administrative Law Judges (PX-A). The Tribe requested a debriefing, and was provided with the summary of strengths and weaknesses prepared by the panel (PX-B).

DISCUSSION

As I informed the parties repeatedly, my role in this proceeding is to review the evidence that was available to the grant officer at the time that she made her decision, and determine whether her decision was arbitrary and capricious, an abuse of discretion, or not in accordance with the law. This is a high threshold for a party to overcome, and occurs only when a decision is based on an erroneous view of the law, or a clearly erroneous assessment of the evidence. Even if I disagree with the grant officer's decision, I must uphold it if I find it to be reasonable.

In its prehearing statement, the Tribe alleged that Ms. Saunders, the grant officer, abused her discretion by failing to take into account the superior qualifications of the Tribe's program director, as compared with the qualifications of the Council's program director. Ms. Michele Taylor was designated in the Tribe's application as their program director. Before she became associated with the Tribe, Ms. Taylor worked for the Council from 1991 to 1996, as job development coordinator, and in fact trained the Council's program director, Ms. Charlotte Stewart. Additionally, Ms. Taylor had extensive experience and education in related fields before she joined the Council. At the hearing, the Tribe stressed the superior qualifications of Ms. Taylor, in contrast to those of Ms. Stewart, whom Ms. Taylor did not feel was qualified to run an employment and training program.

The grant officer, Ms. Saunders, acknowledged that Ms. Taylor was well-qualified to administer an employment and training program for the Tribe. However, she stated that the five criteria set out in the Solicitation refer to the qualifications of the organization, not the qualifications of any particular individual within the organization (Tr. 64). According to Ms. Saunders, as the grant officer she was looking for previous experience on the part of the grantee, as that was what was sought in the Solicitation. The Tribe did not adequately or coherently discuss its previous experience in its application, but focused on the experience and qualifications of Ms. Taylor. However, as Ms. Saunders pointed out, the applicant was the Tribe, not Ms. Taylor (Tr. 63-64).

The Tribe also argued that the grant officer took into consideration improper and irrelevant evidence, referring to a letter written by Ronald O. Ethridge, Sr., dated December 13, 1999, to Mr. E. Fred Tello, Grant Officer at the Department of Labor in Washington, D.C. (DX E at p. 283). Mr. Ethridge's letter was submitted by the Council in support of its application. In his letter, he referred to the fact that the Tribe was competing with the Council for the grant, and stated, *inter alia*, that in October 1999, the Principal Chief of the Tribe, Mrs. Pennie Wright, was removed from the Council Board for violations of the privacy act. Mr. Ethridge also stated that Mrs. Wright, as well as Nancy Carnley, the Tribal Secretary, were under investigation by the U.S. Attorney's Office for forgery and fraud in connection with JTPA applications.

At the hearing, the grant officer, Ms. Saunders, testified that she did not recall reading this particular letter during the grant process, but that in any event, the information contained in the letter did not affect her decision. According to Ms. Saunders, her office receives hundreds of letters from prospective grantees attempting to discredit other prospective grantees, and in fact, it was her understanding that the Tribe had also submitted letters discrediting the Council. Ms. Saunders testified that unless there has been an investigation, and the internal investigator brings a problem to her

attention, she does not pay close attention to letters discrediting competing applicants. In any event, if the allegations in the letter were true, she would have been notified of them by the internal investigator (Tr. 66-67). Ms. Saunders received no such information in connection with the pre-award clearance procedure in this particular grant (Tr. 82).³

Setting aside the issue of Mr. Ethridge's letter, it appears that the main focus of the Tribe's appeal is its claim that the grant officer did not fairly evaluate the Tribe's application, in that the Tribe met each of the criteria listed in the Solicitation, and that it should have been awarded the grant because its program administrator, Ms. Taylor, was much more qualified than the Council's program administrator. I note that the technical panel concluded that the Tribe did not in fact meet any of the criteria set out in the Solicitation. That is, the panel concluded that the Tribe did not present evidence of any experience in operating an employment and training program, or ability to operate such a program.⁴ They did not provide a clearly defined approach to providing services, or identify how they would maintain continuity of services and consistency. They had a very weak description of their planning process, with no indication of a statewide planning process. They did not indicate how they would eliminate duplication of effort or coordinate with other partners; and they did not show that they had the support of other tribes to develop a statewide program delivery system.⁵ Ms. Saunders reviewed the Tribe's application, and concurred with the panel's assessment of the weaknesses in the Tribe's application. A review of the Tribe's application, as well as the testimony of Ms. Carnley, confirms that the Tribe in fact has no experience with statewide job training and employment programs, and that the panel's conclusions about the weakness of the Tribe with respect to the criteria set out in the Solicitation were reasonable.

I conclude that the grant officer correctly found that the Tribe lacks experience in operating employment and training programs. I find the panel's conclusions, and thus those of Ms. Saunders, to be reasonable. The Tribe has not established that the grant determination was based on an unfair consideration of the derogatory information contained in Mr. Ethridge's letter, or that the grant officer's decision was unreasonable, arbitrary, or an abuse of discretion. Ms. Saunders' decision is reasonable in view of the record she had available to her at the time she made her decision. Additionally, I concur with Ms. Saunders that the information she had available to her does not demonstrate that the Tribe should have been ranked higher than the Council. Thus, the grant officer's decision is affirmed.

³ Ms. Saunders also testified that the technical review panel is instructed to follow the criteria in reviewing the applications.

⁴ Identified as a strength was the Tribe's operation of a Tribal Employment Rights Program, and a very small Low Income Energy Assistance program.

⁵ The panel noted that the Tribe provided some letters of support from the Native American, and non-Native American communities, indicating that they were aware of the Tribe, but these letters did not include adequate information showing a strong recognition of the Native American community, and demonstrating the Tribe's ability to provide employment and training services.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the request by the MaChis Lower Creek Indian Tribe of Alabama that the March 1, 2000 decision of the grant officer be reversed is denied.

LINDA S. CHAPMAN
Administrative Law Judge